Filed 4/16/12 Williams v.The County of Los Angeles CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FRED WILLIAMS, Plaintiff and Appellant, v. THE COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B229683 (Los Angeles County Super. Ct. No. BC439063)

APPEAL from a judgment of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Affirmed.

Law Offices of Helena Sunny Wise, Helena Sunny Wise for Plaintiff and Appellant.

Law Offices of David J. Weiss, David J. Weiss, Peter M. Bollinger; Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill for Defendants and Respondents County of Los Angeles and P. Michael Freeman.

Thomas and Thomas, Michael Thomas, Janet Keuper; Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill for Defendants and Respondents Los Angeles County Civil Service Commission, Lawrence D. Crocker, Carol Fox, Vange Felton, Sandy Stivers, Evelyn Martinez, Lynn Adkins, Greg Kahwajian, Michael Miller, and Jerry Ellner.

Yee & Belilove, Steven R. Yee, Steve R. Belilove, Talar Tavlian for Defendant and Respondent Janine McMillion.

Plaintiff and appellant Fred Williams appeals from the judgment entered in favor of defendants and respondents Los Angeles County Civil Service Commission ("Commission"); Lawrence Crocker (the Commission's Executive Director); Sandy Stivers (Assistant to the Commission's Executive Director); Commissioners Greg Kahwajian, Evelyn Martinez, Carol Fox, Vange Felton, Lynn Adkins; Janine McMillion, Jerry Ellner, Michael Miller, P. Michael Freeman; and the County of Los Angeles after defendants' special motions to strike (Code Civ. Proc., § 425.16)[1] were granted. We affirm.

Background

Plaintiff is a labor relations consultant and for many years was authorized to represent public employees before the Commission. In 2008, the Commission found that plaintiff's conduct in two cases, in 2007 and 2008, was in violation of its rules. Defendant Janine McMillion is an attorney who represented the County at one of the Commission hearings which led to the sanction against plaintiff, and defendants Jerry Ellner and Michael Miller were the hearing officers at those hearings.

Plaintiff had previously been warned that any future violation of those rules would lead to a permanent revocation of his privilege to represent clients before the Commission, and in June of 2008, the Commission made that ruling.

Plaintiff also represented public employees in their grievances before the Los Angeles County Fire Department. In 2010, a Fire Department supervisor made a formal complaint about plaintiff to the Fire Chief, defendant Michael Freeman. The supervisor

---

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

wrote that she had participated in a grievance meeting with plaintiff and plaintiff's client, that she had felt threatened by plaintiff's conduct at the meeting, that plaintiff had wasted valuable time berating her and her representative, and that plaintiff would not discuss the grievance in a respectful and non-argumentative manner. As a result of the complaint, Fire Chief Freeman informed plaintiff that he was no longer welcome on Fire Department property.

Plaintiff filed this lawsuit. The first amended complaint, the operative complaint here, brought causes of action for defamation, interference with contractual relations, interference with prospective economic advantage, intentional infliction of emotional distress, and deprivation of civil rights, as to all defendants. The factual allegations concerned the sanctions imposed on plaintiff by the Commission and the Fire Department, and alleged that various of the defendants were biased against him because of his zealous and effective representation of employees, and for that reason had conspired against him and made false statements about him.

Respondents filed special motions to strike, in three separate motions: McMillion filed one motion; the Commission, the Commissioners, Crocker, Stivers, Ellner, and Miller another, and Freeman and the County the third. The motions were accompanied by declarations and other evidence.

Plaintiff's opposition pleadings were also accompanied by declarations and other evidence.

The court granted the motions and dismissed the action. The judgment notes that reasonable attorney fees are awarded to all defendants (§ 425.16, subd. (c)(1)), but our record seems to reflect only one specific award, to McMillion, in the amount of $8,185.

Special Motions to Strike

Section 425.16 provides that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue

shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

When a special motion to strike is filed, the initial burden rests with the defendant to demonstrate that the challenged cause of action arises from protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).)" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the court finds such a showing has been made, it determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*) Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both legal questions which we review independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

The Trial Court Rulings

On McMillion's motion, the court found, "The actions of McMillion upon which plaintiff brings his suit were made during the course of hearings before [the Commission] and [the Los Angeles County Employee Relations Commission]. These statements therefore arise out of litigation activity and are subject to anti-SLAPP." The court then found that plaintiff had not met his burden of showing a probability of prevailing on the merits, finding that McMillion's alleged statements were protected by the litigation privilege.

On the motion brought by the Commission, the Commissioners, Crocker, Stivers, Ellner, and Miller, the court found that as to Ellner and Miller, "the conduct of which plaintiff complains concerns the directions and rulings made in the course of civil service proceedings." As to Crocker, Stivers, and the members of the Commission, the court found that "the conduct of which plaintiff complains concerns acts made before and in connection with a quasi-judicial proceeding." The court also found that the Commission itself was entitled to the protection of the anti-SLAPP statute on the defamation cause of action. The court then found that as to all these defendants, plaintiff had not met his burden of showing a probability of prevailing on the merits, finding that all the statements were protected by the litigation privilege (Civ. Code, § 47) and that all these defendants were protected by judicial immunity. The court dismissed the action as to the individual defendants.

As to the Commission, the court first dismissed the first cause of action, for defamation, then found that the last four causes of action could remain viable, but that the rulings as to the other defendants and the case law cited in those rulings would be applied to the Commission in any subsequent motion. The court then applied that law and those rulings to the Commission, and dismissed the case as to the Commission.

On the motion brought by the County and Freeman, the court found that the County was Freeman's employer and that "the conduct of which plaintiff complains concerns the directions and rulings made in the course of civil service/fire department proceedings. The letter which is the alleged occurrence was written because of the conduct of plaintiff at the hearing; this is covered by anti-SLAPP as it is connected to and part of the grievance proceeding."

The court then found that plaintiff had not met his burden of showing a probability of prevailing on the merits, finding that all the statements were protected by the litigation privilege and that these defendants were protected by the immunity granted by Government Code sections 820.2, 821.6 and 815.2.

Discussion

Plaintiff identifies four issues on appeal. He contends that he should have been allowed to engage in limited discovery before opposing the special motions to strike; that defendants did not satisfy their threshold burdens to show that the challenged causes of action arose from protected activity; that he satisfied his burden of showing a probability of prevailing on the merits; and, finally, that defendants should not have been awarded attorney fees.[2]

1. Discovery

Under section 425.15, subdivision (g), "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

Plaintiff contends that the trial court refused to permit him to engage in limited discovery, that the refusal was unlawful, and that this court should allow the discovery.

These are the facts: The Commission, the Commissioners, Ellner, and Miller filed their special motion to strike on August 20, 2010. Freeman and the County filed their motion on the same day. McMillion filed her motion one month later, on September 20, 2010. All the motions were set for hearing on October 25, 2010.

On September 24, 2010, plaintiff filed a motion for what he termed limited discovery, seeking to depose Miller, Ellner, Crocker, Stivers, McMillion, and Omar Prioleau, described as a former Commission employee. The motion was set for hearing on November 15, 2010, that is, after the special motions to strike were set to be heard.

---

[2] In his outline heading, plaintiff asserts that fees should have been awarded to him, but he makes no argument on the point, and we do not consider it. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

However, plaintiff also filed an ex parte application to shorten time to hear that motion. The application was filed on September 24, 2010.

The ex parte application was denied. Thus, as plaintiff acknowledges, the motion itself became moot.

As defendants note, plaintiff cannot prevail on this issue because he has not challenged the court's ruling on his ex parte application. Further, plaintiff does not establish that he had good cause. He argues that there are issues concerning the degree to which various of the defendants conspired to deprive him and his clients of their civil rights, but does not explain how the depositions he sought would lead to admissible evidence relevant to the motions to strike.

Plaintiff's citation to *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 and *Department of Health Services v. Superior Court* (1980) 104 Cal.App.3d 80 does not assist him, since neither case concerns special motions to strike and the discovery stay which is part of that statute.

2. The Threshold Burden

For purposes of the special motion to strike, an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e).)

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) In deciding whether the "arising from" requirement is met, a court must

consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Gallimore v. State Farm Fire & Casualty Ins. Co*. (2002) 102 Cal.App.4th 1388, 1397.)

Here, plaintiff does not cite to any specific portion of the pleadings or any affidavit submitted in the special motion to strike proceedings. Instead, he argues that "Defendants operated on the assumption that they met their threshold burdens to show the instant dispute arose pursuant to official proceedings, were in the public interest and involved Defendants [sic] *lawful* exercise of their rights to petition and/or engage in free speech. Plaintiff submits that these assumptions were erroneous and offered solely to hide the guilt and responsibilities of each of the co-conspirator named Defendants and others in plotting and preconditioning Hearing Officers against Williams."

We see no assumption. Instead, the trial court found that the activities of which plaintiff complained arose from litigation activity, or in connection with quasi-judicial proceedings, and were thus in furtherance of the right of free speech. In that portion of his brief on appeal dedicated to his argument on this point, plaintiff provides no reason why that ruling was wrong on the law or the facts as to any defendant, but only makes general assertions that there was a conspiracy against him which began before he was the focus of any official investigation, that wrongful acts and criminal acts are not protected by the statute, and that the bad acts of some of the defendants mean that they were not entitled to immunity. Those assertions are not sufficient to prevail on appeal.

3. Probability of prevailing on the merits.

"In order to establish the necessary probability of prevailing, plaintiff was required both to plead claims that were legally sufficient, and to make a prima facie showing, by admissible evidence, of facts that would merit a favorable judgment on those claims, assuming plaintiff's evidence were credited." (*1–800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 584.)

Plaintiff argues that a civil rights violation took place, and that actionable defamation, tortious interference with contract, and emotional distress occurred. He discusses the elements of those causes of action, but does not cite admissible evidence of facts which would merit a favorable judgment on those causes of action.

This is especially true because plaintiff barely addresses the trial court ruling that the litigation privilege barred all these causes of action. Plaintiff's argument on this point consists of citation to two cases, *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, and *McConnell v. Innovative Artists Talent & Literary Agency, Inc*. (2009) 175 Cal.App.4th 169.

Rothman reviewed case law on the application of the privilege to statements made in a press conference, and found that the statements at issue in that case were not subject to the privilege even though they were made in anticipation of litigation, by potential participants in that litigation, finding that "the litigation privilege should not be extended to 'litigating in the press.'" (*Rothman v. Jackson, supra,* 49 Cal.App.4th at p. 1149.)

McConnell concerned a wrongful termination lawsuit by two talent agents, and held that a specified letter restricting their job duties was not made in connection with lawsuits pending between the parties. (*McConnell v. Innovative Artists Talent & Literary Agency, Inc., supra*, 175 Cal.App.4th at p. 177.)

Neither case establishes that the litigation privilege does not apply here. In fact, "The privilege applies to any publication or other communication required or permitted by law in the course of a judicial or quasi-judicial proceeding to achieve the objects of the litigation, whether or not the publication is made in the courtroom or in court pleadings, and whether or not any function of the court or its officers is involved." (*Rothman v. Jackson, supra,* 49 Cal.App.4th at p. 1140.) That describes the allegations of this complaint.

4. Attorney fees

Plaintiff asks us to reverse the award of fees in favor of McMillion. He first contends that the award should be reversed because she should not have prevailed in her special motion to strike. However, we herein affirm the order granting that motion.

Plaintiff next asks us to apply the rule applicable to actions under the Fair Employment and Housing Act, or under federal civil rights causes of action, and find that fees should be awarded to a prevailing defendant only when the action is "unreasonable, frivolous, meritless or vexatious." (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.) We decline the invitation. Section 425.16 subdivision (c)(1) provides that except as otherwise provided, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (§ 425.16, subd. (c)(1).) It does not include the limit plaintiff seeks, and we may not import such a limit from other statutes.

Finally, plaintiff contends that fees should have been denied because he alleged Brown Act violations.

Under section 425.16, subdivision (c)(2), "A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code." The Brown Act, found at Government Code section 54950 et seq., concerns open meetings. We cannot see that plaintiff brought any cause of action under that Act. His factual citation is to fifty pages of deposition transcript of a former civil service advocate with the County Counsel, which plaintiff submitted with his opposition to McMillion's special motion to strike. This citation does not establish that this case is a Brown Act case.

Disposition

The judgment is affirmed. Respondents to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.